

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF WASHINGTON

3  
4 NICOLE LOGAN, et al.,

5 Plaintiffs,

6 v.

7 CITY OF PULLMAN POLICE  
8 DEPARTMENT, et al.,

9 Defendants.

10 No. CV-04-214-FVS

11 ORDER CERTIFYING CLASS ACTION

12 **BEFORE THE COURT** is Plaintiffs' Motion to Certify Class, Ct. Rec.  
13 204. Plaintiffs are represented by Darrell Cochran and Thaddeus  
14 Martin. Defendants are represented by Andrew Cooley, Stewart Estes,  
15 Kim Waldbaum and Richard Jolley.

16 **BACKGROUND**

17 This is a Section 1983 action arising from the response of the  
18 City of Pullman Police Department to an altercation at the Top of  
19 China Restaurant and Attic Nightclub on September 8, 2002.  
20 Originally, there were two separate actions arising from these events.  
21 On May 20, 2005, the Court consolidated *Arnold, et al., v. City of*  
22 *Pullman, et al.*, CV-03-335-FVS, into this matter. There are now more  
23 than 90 named plaintiffs in this consolidated action. More than 70  
24 plaintiffs have been deposed, along with numerous other witnesses.  
25 Plaintiffs move to certify this as a class action and propose the  
26 following class definition:

1 All individuals who were present at the premises known as the  
2 Top of China or the Attic on September 7, 2002, or September  
3 8, 2002, who were adversely affected by the unlawful or  
4 tortuous use of chemical munitions, including but not limited  
5 to oleoresin capsicum, tear gas, CS or CN, and who were not  
6 then employed as law enforcement officers.

7 Alternatively, Plaintiffs propose the following class definitions:

8 All individuals who were present on the **first floor** of the  
9 premises known as the Top of China or the Attic on September  
10 7, 2002, or September 8, 2002, who were adversely affected by  
11 the unlawful or tortuous use of chemical munitions, including  
12 but not limited to oleoresin capsicum, tear gas, CS or CN, and  
13 who were not then employed as law enforcement officers.

14 All individuals who were present on the **second floor** of the  
15 premises known as the Top of China or the Attic on September  
16 7, 2002, or September 8, 2002, who were adversely affected by  
17 the unlawful or tortuous use of chemical munitions, including  
18 but not limited to oleoresin capsicum, tear gas, CS or CN, and  
19 who were not then employed as law enforcement officers.

20 All individuals who were present on the **third floor** of the  
21 premises known as the Top of China or the Attic on September  
22 7, 2002, or September 8, 2002, who were adversely affected by  
23 the unlawful or tortuous use of chemical munitions, including  
24 but not limited to oleoresin capsicum, tear gas, CS or CN, and  
25 who were not then employed as law enforcement officers.

## 26 **DISCUSSION**

1 To obtain class certification, initially Plaintiffs must satisfy  
2 the requirements of Federal Rule of Civil Procedure 23(a). Plaintiffs  
3 bear the burden of persuasion. *See Hannon v. Dataproducts Corp.*, 976  
4 F.2d 497, 508 (9th Cir. 1992). Plaintiffs must demonstrate that (1)  
5 the class is so numerous that joinder of all members is impracticable  
6 ("numerosity"), (2) there are questions of law or fact common to the  
7 class ("commonality"), (3) the claims or defenses of the  
8 representative parties are typical of the claims or defenses of the  
9 class ("typicality"), and (4) the representative parties will fairly  
10 and adequately protect the interests of the class ("adequacy of

representation"). See e.g., *Stanton v. Boeing, Co.*, 327 F.3d. 938, 953 (9th Cir. 2003). The second, third, and fourth elements tend to merge together. *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n. 20, 117 S.Ct. 2231, 2251 n. 20, 138 L.Ed.2d 689 (1997) (hereinafter *Anchem*). Taken together, these three requirements "serve as guideposts for determining whether maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* (citation and internal quotations omitted). If Plaintiffs satisfy the four initial prerequisites imposed by Rule 23(a), Plaintiffs must also show that the action is maintainable under Rule 23(b) (1), (2), or (3). The Court must conduct a rigorous analysis to determine whether the requirements of Rule 23(a) and (b) have been met. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). If the Court is not fully satisfied, certification should be refused. *Id.* While the Court's analysis is rigorous, Rule 23 "confers broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." *Armstrong v. Davis*, 275 F.3d 849, 872 n. 28 (9th Cir. 2001).

**A. Rule 23(a) Requirements**

The threshold task is to determine whether the proposed class satisfies the requirements of Rule 23(a) of the Federal Rules of Civil Procedure, which is applicable to all class actions.

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1           1. Numerosity

2           In order to satisfy the numerosity requirement, Plaintiffs must  
3 demonstrate "the class is so numerous that joinder of all members is  
4 impracticable[.]" Fed.R.Civ.P. 23(a)(1). Impracticable does not mean  
5 impossible; Plaintiffs need only show that it is extremely difficult  
6 or inconvenient to join all members of the class. See e.g., *Harris v.*  
7 *Palm Springs Alpine Estates, Inc.*, 329 F.2d 909 (9th Cir. 1964).  
8 Numbers alone are not determinative of this question. *Daigle v. Shell*  
9 *Oil Co.*, 133 F.R.D. 600 (D.Colo. 1990); *Hum v. Dericks*, 162 F.R.D. 628  
10 (D.Hawaii 1995). This determination must be made on a case-by-case  
11 basis and depends upon the specific facts and circumstances presented.  
12 *Jordon v. County of Los Angeles*, 669 F.2d 1311, 1319-20 (9th Cir.  
13 1982), vacated on other grounds, 459 U.S. 810 (1983), rev'd on other  
14 grounds on remand, 713 F.2d 503 (9th Cir 1983), amended on remand, 726  
15 F.2d. 1366 (9th Cir. 1984).

16           In the present case, the parties do not agree on the exact number  
17 of people were present at the Top of China on the night of the  
18 altercation at issue. Plaintiffs allege that between 300-600 people  
19 were present at the Top of China on the night in question. If there  
20 were even 300 members of the class, joinder would be impractical.  
21 Thus, the Court determines Plaintiffs have satisfied the numerosity  
22 requirement.

23           2. Commonality

24           A class has sufficient commonality "if there are questions of law  
25 or fact common to the class." Fed.R.Civ.P. 23(a)(2). Defendants  
26 argue Plaintiffs have failed to satisfy this requirement because some

1 of the named Plaintiffs have testified they did not feel any effects  
2 of pepper spray, therein denying some of the allegations in the  
3 complaint. This argument is insufficient to defeat a finding of  
4 commonality.

5 Rule 23(a)(2) is a permissive rule; the commonality requirements  
6 are less rigorous than the companion requirements of 23(b)(3). *Hanlon*  
7 *v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Not all  
8 questions of law and fact need to be common to satisfy the  
9 requirement. *Id.* "The existence of shared legal issues with  
10 divergent factual predicates is sufficient, as is a common core of  
11 salient facts coupled with disparate legal remedies within the class."  
12 *Id.* Given the allegation that the officers' use of chemical forces  
13 affected everyone in the building on the evening in question, there  
14 are questions of law and fact common to the proposed class. Thus, the  
15 class shares sufficient factual commonality to satisfy the minimal  
16 requirements of Rule 23(a)(2).

17           3. Typicality

18 Plaintiffs must prove the claims or defenses of the  
19 representative parties are typical of the claims or defenses of the  
20 class. Fed.R.Civ.P. 23(a)(3). As the Ninth Circuit has observed,  
21 "representative claims are 'typical' if they are reasonably co-  
22 extensive with those of absent class members; they need not be  
23 substantially identical." *Hanlon*, 150 F.3d at 1020.

24 Although Plaintiffs allege every individual was injured or harmed  
25 by the officers' conduct, Defendants argue Plaintiffs fail to meet the  
26 typicality requirement because each member of the lawsuit has a

1 different factual situation that cannot be dispensed of in a class  
2 action. For example, Defendants note that some Plaintiffs were  
3 downstairs when the officers arrived; others were upstairs and felt  
4 the effects of pepper spray; and others were outside when the officers  
5 arrived and did not feel any effects of pepper spray. As the  
6 Defendants acknowledge, these factual variations will be most relevant  
7 if, and when, a jury is asked to calculate damages. But, the fact  
8 that damages may vary among the members of the class does not defeat  
9 typicality. As a general rule, typicality may exist even though  
10 "there is a disparity in the damages claimed by the representative  
11 parties and the other members of the class." 7A Charles A. Wright,  
12 Arthur R. Miller and Mary K. Kane, *Federal Practice & Procedure* §  
13 1764, at 235-36 (2005). Further, Defendants' argument that  
14 Plaintiffs' different factual situation prevent a finding of  
15 typicality is unpersuasive if the Court certifies the Plaintiffs'  
16 alternative class definitions, which separate the class members by  
17 their location within the building on the evening in question. Thus,  
18 the Court determines Plaintiffs have satisfied the typicality  
19 requirement.

20           4. Adequacy of Representation

21           Plaintiffs must demonstrate that "the representative parties will  
22 fairly and adequately protect the interests of the class."  
23 Fed.R.Civ.P. 23(a) (4). Adequate representation is essential to  
24 satisfy constitutional due process requirements because absent class  
25 members will be bound by any judgment entered in this action if a  
26 class is certified. *Hanlon*, 150 F.3d at 1020. Representation is

1 considered adequate if the named plaintiffs and their attorneys do not  
2 have any conflicts with absent members and they will prosecute the  
3 action vigorously on behalf of the class. *Id.*

4 In this case, counsel for Plaintiffs have been involved in both  
5 the *Arnold* and *Logan* matters since the beginning of both actions and  
6 they contend that the *Arnold* Plaintiffs should serve as class  
7 representatives. The Court is aware of no improper conflicts of  
8 interest that would deny absent class members adequate representation.  
9 Defendants challenge the timing of this motion for class certification  
10 and argue that the late filing of such an important motion speaks to  
11 the adequacy of representation factor. However, the Court accepts  
12 Plaintiffs' proffered explanation for the delay in re-filing this  
13 motion after the *Logan* and *Arnold* actions were consolidated.  
14 Moreover, Plaintiffs' failure to move for certification sooner does  
15 not speak to the adequacy of representation factor. See 1 Newberg on  
16 Class Actions §3:43, pp. 546-47.

17 The Court finds counsel's prosecution of the case sufficiently  
18 vigorous to satisfy any Rule 23(a)(4) concerns. Plaintiffs' counsel  
19 is a regional firm that has been involved in both the *Logan* and *Arnold*  
20 actions since the very beginning. According to Plaintiffs, counsel  
21 has experience in prosecuting class actions and has the resources,  
22 background, and expertise to adequately represent the interests of the  
23 class.

24       **B. Rule 23(b) Requirements**

25       In addition to meeting the conditions imposed by Rule 23(a),  
26 Plaintiffs must also show that the action is maintainable under

1 Federal Rule of Civil Procedure 23(b)(1), (2), or (3). *Hanlon*, 150  
2 F.3d at 1022 (citation omitted). In this instance, Plaintiffs seek to  
3 maintain a class action under subsection (b)(3) and (b)(2). Rule  
4 23(b)(2) permits a class action to be maintained if "final relief of  
5 an injunctive nature or of a corresponding declaratory nature,  
6 settling the legality of the behavior with respect to the class as a  
7 whole, is appropriate." Rules Advisory Committee Notes on (b)(2).  
8 Plaintiffs offer no specific support for why this action should be  
9 certified as a class action under Rule 23(b)(2). Thus, the Court  
10 declines to certify this class action under Rule 23(b)(2).

11 Certification under Rule 23(b)(3) is appropriate "whenever the  
12 actual interests of the parties can be served best settling their  
13 differences in a single action." *Hanlon*, 150 F.3d at 1022 (internal  
14 quotation marks omitted). To qualify for class certification under  
15 Rule 23(b)(3), a class must satisfy two conditions in addition to the  
16 Rule 23(a) prerequisites: "common questions must 'predominate over  
17 any questions affecting only individual members,' and class resolution  
18 must be 'superior to other available methods for the fair and  
19 efficient adjudication of the controversy.'" *Id.* (citing Fed.R.Civ.P.  
20 23(b)(3)). The "predominance inquiry tests whether proposed classes  
21 are sufficiently cohesive to warrant adjudication by representation."  
22 *Anchem*, 521 U.S. at 623, 117 S.Ct. 2231.

23 Here, a common nucleus of facts and common legal questions  
24 dominate this litigation. Members of the proposed class were all  
25 present on the night of the incident in question. Further, all  
26 members of the proposed class share a common interest in two issues:

1 whether the incident was racially motivated, and whether the Pullman  
2 Police Department's policies or procedures caused the incident.  
3 Although the class members will be pursuing slightly different causes  
4 of action with respect their excessive force claims, depending on  
5 whether they were directly sprayed with O.C. or only suffered  
6 secondary effects of the O.C., common issues of fact dominate both  
7 inquiries. Finally, damages will likely present individualized  
8 issues, but in determining whether common issues predominate, the  
9 inquiry is directed to the issues of liability, not damages. See  
10 *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975) ("The amount of  
11 damages is invariably an individual question and does not defeat class  
12 action treatment."). Thus, the need for individual damages  
13 calculations does not preclude a finding of predominance. For these  
14 reasons, the Court is satisfied that common issues predominate.

15           2. Superiority

16       Rule 23(b)(3) also requires that class resolution be "superior to  
17 other available methods for the fair and efficient adjudication of the  
18 controversy." The inquiry required by this provision requires a  
19 determination with respect to "whether the objectives of the  
20 particular class action procedure will be achieved in the particular  
21 class." *Hanlon*, 150 F.3d at 1023 (citation omitted). "This  
22 determination necessarily involves a comparative evaluation of  
23 alternative mechanisms of dispute resolution." *Id.* Rule 23(b)(3)  
24 contains a nonexhaustive list of factors that may be considered in  
25 determining whether the plaintiffs have demonstrated predominance and  
26 superiority: (A) the interest of members of the class in individually

1 controlling the prosecution or defense of separate actions; (B) the  
2 extent and nature of any litigation concerning the controversy already  
3 commenced by or against members of the class; (C) the desirability or  
4 undesirability of concentrating the litigation of the claims in the  
5 particular forum; (D) the difficulties likely to be encountered in the  
6 management of a class action. *Amchem*, 521 U.S. at 615-16, 117 S.Ct.  
7 at 2246 (quoting Fed.R.Civ.P. 23(b)(3)). "A consideration of these  
8 factors requires the court to focus on the efficiency and economy  
9 elements of the class action so that cases allowed under subdivision  
10 (b)(3) are those that can be adjudicated most profitably on a  
11 representative basis." *Zinser v. Accufix Research Institute, Inc.*,  
12 253 F.3d 1180, 1190 (9th Cir. 2001).

13       The Court determines that certifying a class action under Rule  
14 23(b)(3) is superior to the filing of individual claims because a  
15 class action will accomplish judicial economy by avoiding multiple  
16 suits and protect the rights of persons who might not be able to  
17 present claims on an individual basis. From either a judicial or  
18 litigant viewpoint, there is no advantage in individual members  
19 controlling the prosecution of separate actions. Although some of the  
20 claims pursued by the class members will vary slightly depending on  
21 their location inside the building at the time of the incident in  
22 question, the claims asserted by the class representatives are not  
23 sufficiently anomalous to deny class certification.

24       **III. CONCLUSION**

25       Based on the above analysis, the Court finds that Plaintiffs have  
26 satisfied their burden under Federal Rule of Civil Procedure 23(a) and  
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1 23(b) (3). Therefore, the Court certifies the following class:

2 All individuals who were present at the premises known as  
3 the Top of China or the Attic on September 7, 2002, or  
4 September 8, 2002, who were adversely affected by the  
unlawful or tortuous use of chemical munitions, including  
but not limited to oleoresin capsicum, tear gas, CS or CN,  
and who were not then employed as law enforcement officers.  
5

6 The Court designates the law firm of Gordon, Thomas, Honeywell,  
7 Malanca, Peterson & Daheim, L.L.P., as class counsel, and the Arnold  
8 Plaintiffs as class representatives. Accordingly,

9 **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Certify Class,  
10 **Ct. Rec. 204**, is **GRANTED**.

11 **IT IS SO ORDERED.** The District Court Executive is hereby  
12 directed to enter this Order and furnish copies to counsel.

13 **DATED** this 7th day of December, 2005.

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                          s/ Fred Van Sickle  
                          Fred Van Sickle  
                          United States District Judge  
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